

Water Management Act Blue Ribbon Panel Meeting

September 22nd, 2006

Office for Commonwealth Development
100 Cambridge St., Boston, MA

Present

Steve McCurdy (OCD), David Lutes (EOEA), Charles Aspinwall (MMA), Jim Marshall (MWWA), Pam Heidell (MWRA), Ian Cooke (NepWRA), Steve Angers (Trout Unlimited), Gary Clayton (Mass Audubon), Mary Griffin (Mass DEP), and observers.

Minutes

Minutes from 9-8-06 meeting amended and unanimously approved.

For the record

Mass Audubon and Trout Unlimited object to using the panel's time for discussing the legality of MassDEP's process in developing the policy guidance.

Presentation – William Henchy, P.C., representing MWWA's Position

Legality of DEP Policy No. WMA #: BRP/DWM/DW/P04-1

See prepared legal memo – [Appendix A](#)

Suggested that Panel take both arguments to the AG and ask for an advisory opinion from AG to determine what to do next.

Presentation – Margaret (Peg) Stolfa, MassDEP General Counsel

DEP agrees that there are significant differences between policies and regulations. This policy, however, is guidance, not a regulation, and therefore is not required to use the regulatory public process. This policy was created in the interest of transparency so municipalities understand how DEP is interpreting WMA. The most recent set of permits issued have not been appealed, which is a sign that this policy is appropriate and is working well. DEP also notes that it had promulgated regulations under the WMA that allows for it to establish policies and standards.

Questions and Discussion

Missing Legal Opinion – Mass Audubon and Trout Unlimited noted that there was a third legal opinion (from environmentalist community) that was not represented in this discussion.

Attorney General – A suggestion was offered that panel seek an Attorney General opinion as to whether the policy is legally correct. Concern was noted that since the Attorney General would be representing DEP in any future litigation, the AG office might be unable to offer such an opinion.. Timing was also noted as a problem – In any case, the

Attorney General would be unlikely to be able to give the panel an opinion in time for the report to the legislature.

Appeals - Appeals are required in case of disagreements about permits, however, municipalities assert that DEP has an overwhelming advantage in the legal appeals process. Since DEP has revised the policy, no permits have been appealed.

Line where permit conditioning becomes regulatory -Some group members agree that these standards could be included as individual conditions on a permit, however while DEP believes that the policy merely clarifies how DEP will be conditioning permits henceforth, Municipalities and Water Resource Authorities believe the standards being applied to all permits crosses the line from individual conditions into universal standards that should be set regulatorily, not through policy or guidance (and hence this policy is illegal).

Coming to Resolution - All parties are in agreement that this panel will not be able to come to resolution on the legal issues by themselves. Panel agrees to move forward with other issues.

Process Moving Forward

Subcommittees – The Chair suggested that the panel might benefit from dividing itself into several subcommittees in order to study in more depth a handful of issues. Citing lack of available time and other professional commitments, the panelists declined the invitation.

Next Meeting will focus on Science Issues, with panel members inviting experts to present.

Specific Science Issues for Discussion:

- What effect would the conservation standards have on stream flow in stressed basins (and what does it mean to be a stressed basin? How do we determine that categorization)?
- Are there data gaps that can be identified and closed?
- What future water shortages are projected (keeping long-term perspective in mind)?
- How do the specific standards in question (65 or 85 gallon standard and 10% or 15% unaccounted for water standard) affect stream flow?
- How do the changes in stream flow affect the overall watershed?

Meeting Adjourned, 12:34 pm